MAE BINA SDN. BHD.

v.

CHEE KIE CHONG

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 03-50 OF 1989]
19 AUGUST 1991

CIVIL PROCEDURE: *Summary judgment - Conditional leave to defend granted in chambers - Final judgment - Request for further argument in open Court - Out of time - Certificate of no further argument - Appeal against order of conditional leave - Validity of certificate of no further argument - Breach of 4 day rule - High Court has no jurisdiction to issue certificate out of time - Void and of no effect - Courts of Judicature Act 1964, s. 68(2) - Rules of the High Court 1980, O. 56 r. 2(2) - Rules of the Supreme Court 1980, r. 56.*

On 22 April 1987, the respondent was granted summary judgment by the Senior Assistant Registrar for the amounts being claimed from the appellant. On appeal, the High Court Judge in chambers, on 3 September 1988, granted the appellant conditional leave to defend. The appellant's Counsel, N, knew of this order on 5 September 1988. However, as neither party appealed against this order of conditional leave, final judgment was entered against the appellant on 2 October 1988. The appellant subsequently applied to adjourn the matter into open Court for further argument.

The appellant's application for further argument was dismissed on 29 January 1989 as the Judge held that the time for appeal started to run from 29 January 1989 and not from 7 April 1989. His Lordship also issued a certificate of no further argument, which was received by N on 7 April 1989. Both N and the respondent's Counsel, W, were present on 29 January 1989.

On 18 April 1989, the appellant filed a notice of appeal against the order of the High Court given on 29 January 1989; however, the appellant later applied by way of fresh motion before the Supreme Court to amend the notice of appeal by substituting the date of 3 September 1988 (which was the date of the order of conditional leave to defend) for the date 29 January 1989 (the date of the certificate of no further argument).

The issue for determination was the validity of the certificate issued on 29 January 1989 and the propriety of the appeal before the Supreme Court in the absence of leave to appeal under s. 68(2) of the Courts of Judicature Act 1964 (the Act).

Held:

[1] The one month period limited for appeal under r. 56 of the Rules of the Supreme Court 1980 should commence from 29 January 1989 when appellant's Counsel first had notice of it, and not from April 7 1989 when N physically received a copy of the certificate.

[2] On a close reading of s. 68(2) of the Act and O. 56 r. 2(2) of the Rules of the High Court 1980, no application by any party for further argument, whether orally or in writing, can be entertained by the Court after the expiry of the four days from the date of the order made in chambers. The High Court has no jurisdiction to issue a certificate when the application was made out of time.

[3] N should have either applied in writing within four days of the date of the order dated 3 September 1988 or applied for leave under s. 68(2) of the Act. In this case, the written application by summons in chambers for further argument was made approximately 25 days out of time. Since the four day rule had been breached, the certificate of no further argument issued on 29 January 1989 was null and void and of no effect.

[4] The only way that the appellant could have maintained this appeal was for the appellant to apply for leave to appeal, under s. 68(2) of the Act, in lieu of the certificate, within one month of the date of the order made in chambers.

[Appeal struck out and dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

PROSEDUR SIVIL: *Penghakiman terus - Kebenaran bersyarat untuk membela diberikan di dalam kamar - Penghakiman muktamad - Permohonan untuk penghujahan lanjut di Mahkamah terbuka - Dibuat melebihi had masa - Sijil perakuan tiada penghujahan lanjut - Rayuan terhadap perintah kebenaran bersyarat - Keesahan sijil perakuan tiada penghujahan lanjut - Kemungkiran perintah 4 hari - Mahkamah Tinggi tiada bidang kuasa untuk mengeluarkan sijil perakuan melebihi had masa - Tidak sah dan tidak berkesan - Akta Mahkamah Kehakiman 1964, s. 68(2) - Kaedah-kaedah Mahkamah Tinggi 1980, A. 56 k.2(2) - Kaedah Mahkamah Agung 1980, k. 56.*

Pada 22 April 1987, responden telah diberikan penghakiman terus oleh Penolong Kanan Pendaftar bagi jumlah-jumlah yang dituntut daripada perayu. Apabila rayuan didengar oleh Hakim Mahkamah Tinggi dalam kamar pada 3 September 1988, kebenaran bersyarat untuk membela telah diberi kepada perayu. Peguam perayu, N, mengetahui akan perintah ini pada 5 September 1988. Walaubagaimanapun oleh sebab kedua-dua pihak tidak merayu terhadap perintah kebenaran bersyarat tersebut, penghakiman muktamad telah dimasukkan terhadap perayu pada 2 Oktober 1988. Perayu kemudiannya memohon supaya hujah-hujah lanjut diperdengarkan di Mahkamah terbuka.

Permohonan perayu untuk penghujahan lanjut telah ditolak pada 29 Januari 1989 kerana Hakim yang arif memutuskan bahawa masa untuk membuat rayuan bermula dari 29 Januari 1989 dan bukan 7 April 1989. Hakim yang arif juga mengeluarkan satu sijil perakuan tiada penghujahan lanjut yang diterima oleh N pada 7 April 1989. Kedua-dua Peguam bagi pihak perayu N, dan responden W, telah hadir pada 29 Januari 1989.

Pada 18 April 1989 perayu telah memfailkan satu notis rayuan terhadap perintah Mahkamah Tinggi yang dibuat pada 29 Januari 1989; seterusnya perayu telah memohon melalui usul baru kepada Mahkamah Agung untuk meminda tarikh 29 Januari 1989 dalam notis rayuan (tarikh sijil perakuan tiada penghujahan lanjut dikeluarkan) kepada 3 September 1988 (tarikh perintah kebenaran bersyarat untuk membela dibuat).

Isu untuk Mahkamah adalah keesahan sijil yang dikeluarkan pada 29 Januari 1989 dan kesesuaian (propriety) rayuan di Mahkamah Agung oleh kerana perayu tidak memperolehi kebenaran untuk merayu seperti yang di peruntukkan di bawah s. 68(2) Akta Mahkamah Kehakiman 1964 (Akta tersebut).

Diputuskan:

[1] Had masa sebulan yang ditetapkan untuk rayuan di bawah k.56 Kaedah-kaedah Mahkamah Agung 1980 sepatutnya bermula dari 29 Januari 1989 apabila Peguam perayu diberitahu tentangnya dan bukan dari 7 April 1989 apabila N secara langsung menerima salinan sijil itu.

[2] Setelah meneliti s. 68(2) Akta tersebut dan A. 56 k.2(2) Kaedah-kaedah Mahkamah Tinggi 1980, permohonan untuk penghujahan lanjut tidak boleh dibuat oleh mana-mana pihak sama ada secara lisan atau bertulis, selepas tamatnya tempoh empat hari dari masa perintah itu dibuat dalam kamar. Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mengeluarkan sijil tersebut sedangkan permohonan itu tidak dibuat dalam had masa yang ditetapkan.

[3] N seharusnya memohon secara bertulis dalam tempoh empat hari dari tarikh perintah yang bertarikh 3 September 1988 atau memohon untuk kebenaran di bawah s. 68(2) Akta tersebut. Dalam kes ini permohonan bertulis melalui saman dalam kamar untuk penghujahan lanjut telah dibuat 25 hari melebihi had masa yang ditetapkan. Oleh kerana perintah 4 hari telah dimungkiri, sijil perakuan tiada penghujahan lanjut yang dikeluarkan pada 29 Januari 1989 adalah tidak sah dan tidak berkesan.

[4] Rayuan ini hanya boleh dikekalkan jika perayu memohon dalam tempoh sebulan dari tarikh perintah tersebut untuk kebenaran merayu di bawah s. 68(2) Akta tersebut sebagai ganti sijil tersebut.

[Rayuan dibatalkan dan ditolak dengan kos.]

Cases referred to:

Hamzah bin Abdul Majid & Anor. v. Sungei Way Leasing Sdn. Bhd. [1986] CLJ (Rep) 152 ***(foll)***
Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd. & Anor. [1984] 1 CLJ (Rep) 398 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 68(2)
Rules of the High Court 1980, O. 14, O. 56 r. 2(2),
Rules of the Supreme Court 1980, r. 56(a)

For the appellant - Thangaraj (Joseph Loo with him); M/s. Zainuriah & Thangaraj
For the respondent - Ong Siew Wan; M/s. Andrew Wong & Co.

JUDGMENT

Mohd. Azmi SCJ:

The respondent's claim against the appellant was for the sum of RM131,331.59 for works done as interior decorator at the request of the appellant at its housing project. He also claimed RM22,267.93 being retention monies retained by the appellant in respect of works carried out at Taman Teratai, Kuala Terengganu.

On 22 April 1987, the respondent applied and obtained from the Senior Assistant Registrar (SAR) of the High Court in Kuala Terengganu, a summary judgment against the appellant for the two sums claimed. The SAR was of the view that the only two issues before the Court were not triable, namely whether the appellant company had requested for the interior decoration services and if so, whether the said services had been rendered. The SAR accepted a letter dated 26 August 1986 written by Encik Abdul Rahim bin Hj. Mohd. in his capacity as the project manager of the appellant company at the relevant time, as an admission of liability by the appellant, and rejected the defence contention that Encik Abdul Rahim bin Hj. Mohd. had no authority to sign the letter.

The appellant had appealed against the SAR decision to the High Court Judge in chambers, who on 3 September 1988 varied the O. 14 judgment by granting conditional leave to defend to the appellant on payment into Court a sum of RM132,000 within two weeks. Originally neither party had appealed against the order of conditional leave, but when the appellant failed to comply with the condition imposed and a final judgment entered on 2 October 1988

in favour of the respondent, it was only then that the appellant decided to appeal against the conditional leave order of 3 September 1988. On the hearing of the appellant's application for further argument on 29 January 1989 in respect of the conditional leave order, the learned Judge dismissed the application and at the same time pronounced his decision to issue a certificate of no further argument in the presence of Encik K. Nadarajah Counsel for the appellant and Encik Andrew Wong Counsel for the respondent. Subsequently on 7 April 1989 Encik Nadarajah received a copy of the certificate dated 29 January 1989. According to the learned Judge the time for appeal started to run from 29 January 1989 and not from 7 April 1989. If so, then the notice of appeal filed on 18 April 1989 was out of time under r. 56 of the Supreme Court Rules 1980. In our view, in the case of an appeal from an order in chambers, r. 56(a) clearly provides that no appeal except by leave of the full Court, be brought after expiration of one month from the date when such order was pronounced or after the issue of certificate of no further argument, whichever is the later or when the appellant first had notice of it. In the present case, the appellant through its Counsel knew of the issue of certificate when it was ordered by the Judge on 29 January 1989. In the circumstances the learned Judge was correct in holding that the one month period limited for appeal should commence from 29 January when appellant Counsel first had notice of it, and not from 7 April 1989 when he physically received a copy of the certificate.

However, the fundamental issue that arose in this case was the validity of the certificate itself and consequently the propriety of the appeal before us in the absence of leave to appeal under s. 68(2) of the Courts of Judicature Act 1964.

Purporting to act under the certificate of no further argument dated 29 January 1989, the appellant filed a notice of appeal on 18 April 1989 against the order of the High Court given on "29 January 1989". There was undoubtedly an error in the notice, because the only decision made on that date was the granting of the impugned certificate of no further argument on which the appellant was relying to maintain the appeal. There is now a fresh motion before us filed by the appellant to amend the notice of appeal by substituting the date of "3 September 1988" for the date "29 January 1989". The appellant obviously did not intend to appeal against the order granting a certificate of no further argument nor against the final judgment of 2 October 1988; but it was dissatisfied with the order made in chambers which allowed it conditional leave only instead of unconditional leave to defend. Notwithstanding the contemporaneous letter of admission of liability by its project manager, Encik Abdul Rahim bin Hj. Mohd., the appellant persisted in maintaining the stand that it was entitled to unconditional leave to defend.

Be that as it might, what was crucial here was not the inane error in the date mentioned in the notice of appeal, which could perhaps be mercifully remedied by an amendment. The problem arose from the indisputable fact that the appellant's application for further argument was not made within the four days period as required by s. 68(2) of the Courts of Judicature Act 1964 read with O. 56 r. 2(2) of the Rules of the High Court 1980. These provisions state:

Section 68(2):

> No appeal shall lie from an order made by a Judge of the High Court in chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument, in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

Order 56 r. 2(2) RHC:

> Any party dissatisfied with any order made by a Judge in chambers may apply, at the time the order is made, orally or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order as he thinks fit.

In *Hamzah bin Abdul Majid & Anor. v. Sungei Way Leasing Sdn. Bhd.* [1986] CLJ (Rep) 152, a summary judgment had similarly been given by the SAR. The appeal to the High Court was dismissed in chambers. No oral application was made for further argument, but a written application was subsequently made out of time by about 20 days. On a preliminary objection that the appeal was not properly brought before the Court, Syed Agil Barakbah SCJ observed at p. 153:

> It is clear therefore that the application was made out of time and we are of the view that had the learned Judge been aware of the defect he would not have issued the certificate.

On close reading of s. 68(2) and O. 56 r. 2(2) together, we are of the view that no application by any party for further argument whether orally or in writing can be entertained by the Court after the expiry of the four days from the date of the order made in chambers. The High Court has no jurisdiction to issue a certificate when the application was made out of time. It is mandatory that a party who wishes to take advantage of the further argument provision should apply either orally at the time the order in chambers is made, or in writing at any time within four days from the date of the order.

On 3 September 1988, the appellant's Counsel was absent when the order in chambers granting conditional leave to defend was made, thereby making it quite impossible for him to apply for further argument orally. The decision was conveyed to him by respondent Counsel by letter dated 5 September. He should have applied in writing within four days from the date of that order, but for some reason that was not or could not be done. The next step ought to be an application for leave under s. 68(2). Again that was not done. Instead, the written application by summons in chambers for further argument was made about 25 days out of time which the learned Judge had no jurisdiction to entertain. According to the grounds of judgment of the learned Judge, the summons in chambers was filed on 2 October 1988 to apply out of time for the adjournment of the matter in Court for further argument. Obviously the learned Judge had overlooked the fact that he had no jurisdiction to entertain the application. Had it been otherwise, he would certainly have dismissed the summons in chambers *in limine.* Since 'the four-day rule' had been breached, the certificate of no further argument issued on 29 January 1989 was undoubtedly null and void and of no effect.

In *Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd. & Anor.* [1984] 1 CLJ (Rep) 398, the Federal Court at p. 401 held:

> But in truth there is no conflict at all between s. 68(2) and r. 56(a). Section 68(2) deals with non-appealable matters whereas r. 56 governs the time limit for filing notice of appeal. An appeal against an order in chambers to the Federal Court is not properly brought unless firstly the case is appealable under s. 68 and secondly the notice of appeal has been filed within the time prescribed by r. 56(a). The order is only appealable if the aggrieved party has fulfilled one of the conditions imposed by s. 68(2).

On the particular facts of the present case, the appellant had complied with none of the

prerequisites imposed by s. 68(2). There was a chain of errors in the prosecution of this appeal. The only way how this appeal could have been maintained was for the appellant to apply for leave to appeal in lieu of the certificate, within one month of the date of order made in chambers, irrespective of the value or nature of the respondent's claim. On 2 October 1988, instead of applying for further argument out of time, the appellant was then still within time to apply for leave to appeal from the High Court under s. 68(2). Since the appellant had failed to do so, we regretfully found the present appeal could not be maintained and we accordingly ordered it to be struck out and dismissed with costs. We also ordered that the deposit be paid to the respondent to account of taxed costs.

Also found at [1991] 3 CLJ 2068